STATE OF NORTH DAKOTA

DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW,**
Mark Novak	)	**AND ORDER**
	)	
	)	**OAH File No. 20030430**
	)	Case No. 03-062

. . . . . .

On November 5, 2003, an administrative complaint was filed with North Dakota Commissioner of Agriculture ("Commissioner") by Jeff Weispfenning, the deputy commissioner of the North Dakota Department of Agriculture ("Department"), requesting administrative action against Mark Novak, a licensed private applicator of pesticides in North Dakota, the respondent. The complaint cites as grounds for administrative action, N.D.C.C. § 4-35-15(2) and (5).

On December 30, 2003, the Department of Agriculture requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue findings of fact and conclusions of law, as well as a final order, in regard to the administrative complaint. On January 5, 2004, the undersigned ALJ was designated to preside as hearing officer.

On January 13, 2004, the ALJ issued a Notice of Hearing. At the request of the parties, the ALJ issued a Notice of Rescheduled Hearing. That February 24, 2004, notice scheduled an April 8, 2004, hearing. The hearing was held as rescheduled. The Department was represented at the hearing by Assistant Attorney General Dean J. Haas. Novak was present at the hearing and was represented by Sarah Vogel of Bismarck. The Department called four witnesses, including Novak. Novak testified in his own behalf and called one witness, an expert witness,

Dr. Nalewaja. Twenty-six exhibits were offered. Twenty-five were admitted. One was withdrawn. *See* attached exhibit list.

At the close of the hearing the Department asked that the hearing be continued to give the Department the opportunity to call its own expert witness. The hearing was continued indefinitely. On June 4, 2004, the Department notified the hearing officer that it would call a Department employee, Mr. Gray, as its expert witness. On June 14, 2004, the ALJ issued a Notice of Rescheduled hearing. The notice scheduled a hearing for July 22, 2004, to take additional expert testimony. Mr. Gray testified and Novak recalled Dr. Nalewaja to testify. Two additional exhibits were offered and admitted. *See* attached exhibit list.

On August 23, 2004, the Department filed the "Brief of the Department of Agriculture. On September 17, 2004, Novak filed the "Brief of Appellant." On September 24, 2004, the Department filed the "Reply Brief of the Department." The hearing on the complaint closed as of September 24, 2004.

Based on the evidence presented at the hearing and the briefs of the parties, the administrative law judge makes the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

1. At the time of the allegations of the Complaint, Mark Novak ("Novak") was a licensed private applicator of pesticides in North Dakota. He has a farming operation near the city of Lankin, North Dakota. His farm is next to, just east of, a farm operated by Dennis Brodina ("Brodina"), whose farm is adjacent to the city of Lankin. *See* exhibit 5. The allegations of the Administrative Complaint concern the alleged spray drift of pesticides from

[1] In the findings of fact, whenever the hearing officer uses the word "testified" or "said" in conjuction with a witness statement, he is accepting the testimony related by that witness as fact, unless refuted or explained.

applications of pesticides by Novak on his wheat field, part of which is next to a Brodina alfalfa field. *See, id.*

2. On June 11, 2003, Brodina telephoned a "pesticide complaint" against Novak to the North Dakota Department of Agriculture ("Department"). Exhibit 2, at 1.

3. On June 11, 2003, a Department consumer protection inspector (field inspector), Dan Sletten ("Sletten"), investigated Brodina's complaint against Novak. Exhibit 2, at 2; exhibit 3.

4. During the course of his investigation, Sletten took several samples of alfalfa from the east side of Brodina's alfalfa field, close to Novak's wheat field, for the purpose of a pesticide sample analysis. Exhibits 3 and 4; see exhibits 5, 22, and 23 for the location of relevant features that are a part of the Sletten investigation. Sletten took no other samples of any plants, elsewhere. There seem to be no concerns about the sampling procedure itself, *i.e.*, whether the analysis results obtained were indeed analysis results from the Brodina alfalfa sampled by Sletten.

5. Sletten did not take samples of plants for analysis from plants in the North Brodina pasture. He did not take samples of plants for analysis from plants in the embankment and ditch area between the Brodina alfalfa field and the Novak wheat field. He did not take samples of other plants that appeared to have some damage near the Brodina alfalfa field. *See* exhibit 11. Sletten testified that he did not notice much, if any, pesticide effect on (damage to) the trees and shrubs in the embankment and ditch area. Novak testified that he did not see any pesticide damage to the trees and shrubs and other plants in the embankment and ditch area.

6. Sletten interviewed Brodina as part of his pesticide investigation. Sletten did not interview any of Brodina's neighbors, except Novak, during his investigation of the Brodina

complaint. Sletten did not take a statement from Novak, however. Sletten testified that it is standard Department practice to contact neighbors in the area to see if anyone else made applications of pesticides at about the same time near the damaged area, but he did not do that in this case because he believed that the cause of the damage to Brodina's alfalfa was from Novak's spraying. Novak testified that there is a field on the south side of the cemetery that gets sprayed and that much of the CRP and pasture land in the nearby area gets sprayed, some by aerial spraying. He said that the cemetery is very narrow. He also said that he believes the cemetery gets sprayed. *See* exhibit 5 for approximate location of cemetery. Novak said that the city of Larkin sprays for dandelions. Novak testified that he noticed wilting in other areas of Brodina's alfalfa field besides on the east side, including in the Southeast and Southwest corners of Brodina's alfalfa field. Although Sletten said he saw no apparent pesticide damage in those areas mentioned by Novak, he testified that he did not check closely in those areas.

7. The alfalfa samples taken by Sletten went to the city of Fargo, Fargo Cass Public Health Environmental Laboratory ("Fargo"), for analysis of pesticide content. Exhibit 4.

8. Fargo's analysis detected MCPA (3.37 ug/g), Bromoxynil (0.169 ug/g), and Fluroxypyr (< 0.02 ug/g - undetectable) in the alfalfa samples provided by Sletten from his investigation. Exhibit 4, at 2. Sletten had asked for analysis of Bromox (Bronate), Starane, and Discover. Exhibit 4, at 1. Bromoxynil and MPCA are the active ingredients of Bronate, which is essentially the same pesticide as Bromox or Brox M. Fluroxypyr is the active ingredient for Starane. Fargo did not analyze for Discover.

9. Dean Sletten, Fargo's chief chemist, testified that the finding of MCPA was a "fairly strong hit," from an application that "had to be fairly recent."

10. The Department of Agriculture administrative complaint against Novak alleges violations of N.D.C.C. § 4-35-15(2), and (5), pesticide application inconsistent with the labeling or not in accordance with the labeling (*see* N.D. Admin. Code § 60-03-01-06(1)), and pesticide operation in a faulty, careless, or negligent manner. It does not allege a recordkeeping violation.

11. The evidence shows, by the greater weight of the evidence, that Novak applied pesticides (herbicides and fungicides) by ground application on his wheat field next to Brodina's alfalfa field on June 8, 9, and 11, 2003. On June 8, he applied Discover, Starane, and Brox M (herbicides) to the wheat field from 6:00 p.m. to 8:00 p.m. In his application record, Novak noted the wind to be from the North, Northwest, at 5-8 mph. *See* exhibit 24. On June 9 and 11, 2003, Novak applied Bumper (a fungicide) to the wheat field from about 11:00 a.m. to 12:15 or 12:30 p.m. on June 9 and finishing on June 11. *See id.; but* see exhibit 1.[2] In fact, Novak was just completing the spraying of Bumper on his wheat field on June 11, when Sletten was investigating the Brodina complaint. Testimony of Novak, Sletten, and Brodina. *See* exhibit 11, at 22, and 23. Novak testified that he used flair nozzles, low pressure, and lowered booms to reduce spray drift. He said that he did everything possible to minimize or reduce spray drift and get good coverage. Novak testified that on June 9 he stopped spraying that day in the middle of his wheat field because the wind was picking up. Where he stopped would be a considerable distance from the Brodina alfalfa field. On June 11, 2003, Novak continued spraying Bumper; he worked spraying from mid-field to the west edge of the wheat field. Brodina testified that he smelled chemical in the air on June 9, and that he saw Novak in the field spraying on June 9. Novak does not list the wind speed or wind direction on his application record for June 9.

2. Exhibit 1 lists only two days of spraying and omits any mention of spraying Bumper. Novak testified at the hearing that he forgot to list Bumper in his statement and testified at the hearing that he sprayed on June 11, too, a fact confirmed by photographs and other testimony.

Exhibit 24. The complaint Brodina called in on June 11 states that he saw Novak spraying between 2:30 and 3:30 p.m. on June 9. Exhibit 2, at 1. Brodina's voluntary statement written on June 11 states between 2:30 and 3:30 p.m., on June 9, he could smell chemical fumes coming from the Novak wheat field, but it did not say that Brodina saw Novak spraying at that time. At the hearing, Brodina was not certain when he saw Novak spraying. He testified that it may have been earlier on the 9th that he saw Novak spraying and that he later smelled the chemical and noticed wilting damage to his alfalfa. Brodina said he wasn't certain when he saw Novak spraying but he was certain he saw him spraying on June 9 and smelled chemical fumes and saw wilting in his alfalfa, all on that same day. Novak testified that the wind was "picking-up" when he quit spraying on June 9.

12. There is no evidence that Brodina sprayed pesticides that may have caused damage to his alfalfa in 2003, only speculation that he may have. Brodina denied spraying any pesticides that may have caused damage in the vicinity of his alfalfa in 2003. Novak testified that he had not seen Brodina spray his alfalfa field.

13. Brodina did not file a report of pesticide damage under N.D.C.C. § 4-35-21.1, for damage resulting from the Novak spraying.

14. The North Dakota Agricultural Weather Center Network ("NDAWN") provides recorded weather data, hourly results for certain weather conditions, reporting categories at various locations in North Dakota each day. The Department, in its investigations of allegations of pesticide spray drift, routinely uses the NDAWN weather data from three nearby reporting locations (usually triangulated) to provide evidence of the probable similar weather conditions at the site of the investigation, at the time indicated by the investigation. For June 8, 2003, the relevant weather information for Forest River, Crary, and Langdon at 6:00, 7:00, and 8:00 p.m.

(DST) was 8.1 mph average wind speed, 16.1 mph maximum wind speed, wind direction of 349 degrees (NNW), with a wind direction standard deviation of 20 degrees (6:00); 8.2, 12.8, 358, and 20 (7:00); 7.6, 12.5, 358, and 23 (8:00) - Forest River -- 9.0, 15.7, 344, and 20; 8.0, 12.5, 355, and 18; 6.5, 10.7, 352, and 12, respectively - Crary -- 5.7, 11.0, 350, and 26; 5.2, 13.2, 2 (NNE), and 21; 4.6, 8.9, 1, and 30, respectively - Langdon. For June 9, 2003, the relevant weather information for Forest River, Crary, and Langdon at 11:00 a.m., 12:00 noon, and 1:00 p.m. (DST) was 5 mph average wind speed, 11 mph maximum wind speed, wind direction of 125 degrees (ESE), with a wind direction standard deviation of 19 degrees ; 9,12, 143, and 12; 9, 14, 142, and 12, respectively - Forest River -- 9, 12, 144, and 8; 12, 20, 149, and 10; 14, 20, 165, and 10, respectively - Crary -- 7, 13, 124, and 14; 10, 16, 135, and 12; 10, 17, 154, and 13, respectively - Langdon. For June 9, 2003, the relevant weather information for Forest River, Crary, and Langdon at 3:00 p.m. (DST) was 12, 18, 139, and 11; 17, 24, 177, and 13; 11, 16, 78, and 9, respectively. Sletten estimated that Forest River is about 20 to 25 miles from the Brodina farm, Crary about 35 to 40 miles, and Langdon about 35 to 40 miles. Novak estimated that each of these locations is about 45 to 50 miles from Lankin (again, the Brodina farm is right next to the town). In any case, Lankin is a considerable distance from each of the three NDAWN sites.

15. Bronate is a restricted use pesticide, an herbicide. Exhibit 12, herbicide label. The label for Bronate states, *inter alia* "…[d]o not apply when weather conditions favor drift from the target areas … [d]o not apply when winds are gusty or when other conditions favor poor spray coverage and/or off target spray movement …"

16. Starane is a restricted use pesticide, an herbicide. Exhibit 13, herbicide label. The label for Starane states, *inter alia*:

> [d]o not apply Starane directly to, or otherwise permit it to come in direct contact with, susceptible crops or desirable plants including … alfalfa …[a]void

> applications where proximity of susceptible crops or other desirable plants is likely to result in exposure to spray or spray drift …[a]voiding spray drift at the application site is the responsibility of the applicator … [t]he pesticide should only be applied when the potential for drift to adjacent areas…is minimal (*e.g.*, when wind is blowing away from the sensitive areas).

17. Discover is a restricted use pesticide, a herbicide. Exhibit 14, herbicide label. The label for Discover states, *inter alia*:

> [a]void all direct or indirect contact (such as spray drift) of Discover Herbicide with crops other than those recommended for treatment on this label, since injury may occur … [a]voiding spray drift at the application site is the responsibility of the applicator … [t]he pesticide should only be applied when the potential for drift to adjacent sensitive areas…is minimal (*e.g.*, when wind is blowing away from the sensitive areas).

18. Bumper is a restricted use pesticide, a fungicide. Exhibit 18, fungicide label. The label for Bumper states, *inter alia* "[t]o avoid spray drift, do not apply when conditions favor drift beyond the target area." Although there are further admonitions in regard to spray drift given in regard to aerial application, none are given for ground applications. *Id.* Although application of Bumper may result in crop injury, the primary label concern in its application is its affect on water and aquatic animals. *Id.*

19. Sletten testified that wind speeds of greater than 15 mph are generally more risky and conducive to spray drift. He further said that most spraying of pesticides should be done between wind speeds of 3-15 mph. He said that although 15 mph is a benchmark, whether a pesticide should not be sprayed to avoid drift depends upon other conditions too, *e.g.*, location of the spraying, wind direction, and type of equipment used.

20. On June 8, 2003, the wind speeds at Lankin between 6:00 and 8:00 p.m. were more than likely from the North, Northwest, at average speeds of 4.6 to 9.0 mph, perhaps as high as 16.1 mph., at times, according to NDAWN. Although it is possible that the winds on June 8, between 6:00 and 8:00 p.m. were at times from the North, Northeast, Novak himself, on his

spray record lists the wind speed at 5-8 mph from the North, Northwest. Applications of pesticides, specifically the herbicides Bronate, or Brox M, Starane, and Discover, as indicated by the Novak records, were very unlikely to drift to Brodina's alfalfa field on June 8. Even if the conditions were more like those at the three NDAWN sites, than those recorded by Novak, they were unlikely to drift to Brodina's alfalfa field on June 8. Further, even if drift did occur, *e.g.*, because of swirling winds or winds more from the North, Northeast, at times, the application of the three pesticides on June 8 was not in violation of the label or otherwise in violation of the law, and was not an application made in a faulty, careless, or negligent manner. The drift, if any occurred, is more likely to have been away from the Brodina field to the Southeast, just as the label advises. It should be noted that besides a likely favorable wind to causing drift to the southeast, Novak's application was a ground application and there was a considerable distance between the wheat field and the Brodina alfalfa field, the ditch and embankment were in between, a distance of at least 50 feet, possibly as much as 100 feet.

21. Sletten testified that even at the lower wind speeds of earlier in the day on June 9, evidence of damage occurring from applications of pesticides is a violation of the pesticide laws, "a label violation." He said off target applications are a violation of the pesticide laws. Presumably, his testimony would be the same for off target applications on June 8, at lower wind speeds. The Department's position as articulated by Sletten is that strict liability applies in this matter. The theory of applying strict liability in pesticide application cases stems from the extremely hazardous nature of the activity. However, most cases of successful tort actions against applicators of pesticides are based on ordinary negligence. Harl, *Agricultural Law*, § 15.01[3] (2004). It is only when the application is an aerial application that strict liability has been applied in tort action, but that is still a minority position. *Id.* In *Binder v. Perkins,* 213

Kansas 365, 516 P2d 1012 (1973), an aerial applicator was found liable for failing to halt aerial spraying on a windy day.

22. On June 9, 2003, Novak was applying a fungicide, Bumper. Novak did not record wind speed or direction for this application. But, NDAWN data shows average wind speeds during that time of from 5 to 14 mph, perhaps a high as 16-17 mph, at times, and out of the Southeast or South, Southeast. These applications could have drifted onto Brodina's property, thus likely accounting for Brodina smelling pesticides during the day. But, it is not known whether any Bumper was found in Brodina's alfalfa, and if it were found, it likely did not harm Brodina's alfalfa, because it is a fungicide. *See* FOF #18, above.

23. Application of Bumper on June 9, between 10:00 a.m. and 12:30 p.m., was arguably a label violation, but if so, a borderline label violation. The label is not very specific about when not to spray. *See* FOF #18. Sletten testified that even a Starane or Bronate application occurring on June 9, at 10:00 a.m. (if it occurred) was a borderline application, "not too bad." In other words, there was some chance that Bumper would drift onto the Brodina alfalfa because of the wind velocity and direction. Again, however, the label for Bumper is more concerned with drift from aerial applications and drift onto aquatic habitat. It is not clear from the label whether Bumper would be harmful or helpful to alfalfa. Again, it is not known, whether indeed, Bumper did drift onto the Brodina alfalfa because the alfalfa was not analyzed for the active ingredient of Bumper.

24. The evidence does not show that Novak sprayed Bronate or Brox M, Starane, and Discover on his wheat field on June 9, 2003. Rather, he sprayed Bumper on his wheat field on June 9 and June 11, 2003. The evidence shows that Novak sprayed Bronate or Brox M, Starane, and Discover on his wheat field on June 8, 2003.

25. There is an embankment and ditch between the Novak wheat field and the Brodina alfalfa field. The embankment is about 10-15 feet high. Testimony was somewhat conflicting about the distance from the edge of the Novak wheat field over the embankment and across the ditch, to the Brodina alfalfa field. Sletten estimated about 50 feet; Brodina estimated at least 50 feet. Novak estimated about 75-100 feet. There are trees and bushes on parts of the embankment. *See* several pictures in exhibit 11, and exhibit 25.

26. On or about June 11, 2003, there was evidence of wilting plants both in the alfalfa field and in other spots near by it. *See* several pictures in exhibit 11. Brodina testified that the wilting damage to plants occurred about 50 feet in from the edge of his alfalfa field. However, there was no evidence of yellowing or burning of the Brodina alfalfa or other foliage near the Brodina alfalfa.

27. The condition of Brodina's alfalfa field was poor, at best, in June 2003. It was full of weeds. *See* several pictures of exhibit 11. Brodina's alfalfa recovered from the wilting it suffered on June 11; Brodina harvested it around June 21. The wilted alfalfa encompassed a small area of the total field. Brodina apparently suffered no economic loss from the pesticide damage to his alfalfa on or about June 11.

28. Brodina and Novak have had disputes in the past. They are not friendly neighbors. Both acknowledged that at the hearing. Some of their disputes were apparently aired at the Larkin City Board. Novak testified that Brodina has accused him of many things over the years.

29. Novak has not previously been found in violation of the pesticide laws of North Dakota.

30. Although there is some evidence that Novak was not cooperative in this pesticide investigation, there is other evidence showing reasons, some justifiable reasons, for his lack of cooperation. The Department never saw Novak's application records until after the first portion of the hearing, when Novak sent them to the hearing officer. *See* Exhibit 24.

31. Dr. Nalewaja, a professor emeritus in agronomy at North Dakota State University, testified as an expert for Novak. Mr. Gray, the Department's pesticide registration coordinator, testified as an expert for the Department. Resume, exhibit 27. Dr. Nalewaja had some concerns with the methods of the Department's pesticide investigation in this matter and some concerns about the results of the Fargo analysis as related to the alleged Novak spray drift. He thought it a real possibility that if the detected chemicals were from pesticides sprayed by Novak on his wheat field that, rather than being found in Brodina's alfalfa because of particle spray drift, they were there because of vapor drift occurring later after the spraying; meaning that Novak's spraying operations were not a factor at all in the movement of the pesticide. He believes that the nature and substance of Novak's applications were inconsistent with what was found in the Fargo analysis, as alleged particle spray drift. But, Dr. Nalewaja acknowledged that many different factors could have come into play if there was spray drift from Novak's spraying his wheat field that reached Brodina's alfalfa field. Dr. Nalewaja was also very concerned about the lack of an analytical finding that detected fluroxypyr in the alfalfa samples because of the Starane sprayed by Novak. He said that result tends to show that the chemicals found in Brodina's alfalfa were not from spray drift resulting from Novak's pesticide application on his wheat field. Mr. Gray had plausible explanations in regard to some of Dr. Nalewaja's concerns. His testimony indicated that the sample analysis results obtained by Fargo could be consistent with spray drift occurring from the pesticides sprayed by Novak on or about June 8 2003.

However, when asked the question whether if wind conditions were favorable for drift on or about June 8, whether Novak's application of pesticide was the likely source of the chemicals found by Fargo's analysis in the Brodina alfalfa from samples taken on June 11, Gray said he was not comfortable in making that determination. Mr. Gray did not have concerns with the results of the Fargo analysis, as did Dr. Nalewaja. Mr. Gray said that he could not rule out the possibility that Novak's application of pesticides was the source of the Fargo analytical findings. He said that the pictures of the pesticide investigation (exhibit 11) look consistent with a recent pesticide application. He said that the damage caused to the Brodina alfalfa was likely caused by spray drift. However, he also said that nothing in the Fargo analysis rules out other possible sources of that spray drift. Mr. Gray said that a pesticide investigation is the better indicator of a conclusion assessing the source of the pesticide. He also said that although the pesticide found in Brodina's alfalfa could have come from the pesticide application by Novak on or about June 8, it could have come from pesticide sprayed a week earlier by someone else. However, he further said that damage to Brodina's alfalfa was likely from pesticide spray and that the spraying was done sometime not too long before June 11, and most certainly during the 2003 growing season. Both Dr. Nalewaja and Mr. Gray, after reviewing the pictures from the investigation (exhibit 11), saw no signs of yellowing or burning on plants in or near the Brodina alfalfa field and both agreed that bromoxynil, the active ingredient of Bronate will cause yellowing on plants. Dr. Nalewaja testified that yellowing or burning can be seen in plants from one to three days after application. He said that yellowing or burning of plants occurs much quicker if MCPA and bromoxynil are both part of the pesticide sprayed. Mr. Gray testified that within about two days plants sprayed with bromoxynil can show yellowing, but not burning. Both experts acknowledged that MCPA causes wilting or twisting in plants but that the pesticide

2-4-D can also cause wilting or twisting in plants. There was no analysis for 2-4-D done in this matter. Mr. Gray said that he would have sampled more widely if he had conducted the pesticide investigation.

ANALYSIS

It is apparent that the Department thought that it had a stronger, more straight forward case when it brought the administrative complaint against Novak. In the Department's defense, it appeared, based on the information it had, that Novak applied the pesticides Starane, Bronate, and Discover on June 9, 2003, between 2:30 and 3:30 p.m., when it was indeed windier than earlier in the day, and the winds were from the southeast. The Department did not have Novak's records at that time, and Novak's statement in exhibit 1 appears damning, especially when coupled with some of the information in Brodina's statements. As it turns out; however, some of the Department's initial facts and conclusions are wrong. At least the greater weight of the evidence, the evidence the hearing officer believes is most likely correct, shows that to be the case.

It is possible, of course, that the pesticides Novak applied on June 8, containing MCPA and bromoxynil, did drift over to the Brodina alfalfa, or that chemicals from his pesticides vaporized and moved over to the alfalfa. However, the evidence does not show that it is more likely than not that Novak's pesticide spray from June 8 did drift onto Brodina's alfalfa. There are too many problems and concerns with the Department's allegations that Novak's application was the cause of the damage to Brodina's alfalfa. There are also too many unanswered questions about other possibilities.

Further, the evidence shows that Novak's ground applications, when they occurred, were not in violation of a label. Novak took all necessary precautions in his operations on June 8 and

June 9. There is no evidence contrary, except the presence of pesticide like that he sprayed on Brodina's alfalfa and evidence that Novak sprayed at a time that could have resulted in damage to Brodina's alfalfa. The pesticide labels are not very specific about when and under what conditions the pesticides Novak sprayed are to be applied. It is likely that Novak's application of Bronate, Starane, and Discover on June 8 was in compliance with the label.

Further, the evidence shows that Novak took every reasonable precaution to make his application of these three pesticides an application that would not cause spray drift onto Brodina's alfalfa. There is no evidence that his application methods or equipment were faulty. There is no evidence that he was careless. There is no evidence that he was negligent in any way. His operations were not conducted in a faulty, careless, or negligent manner.

Again, the only reliable evidence is that Novak did apply the pesticides that were found on the Brodina alfalfa at a time when it was possible that they came from Novak's spraying, and the active ingredients of some of his pesticides were found on Brodina's alfalfa. But, that is not enough, under these circumstances, to find violations of the pesticide laws, as alleged, especially when there could have been other possibilities, and those were not explored.

CONCLUSIONS OF LAW

1. Novak is a private applicator of pesticides in North Dakota subject to the pesticide laws found in N.D.C.C. ch. 4-35 and N.D. Admin. Code art. 60-03.

2. Novak's contention that unless Brodina presents a notice of loss to the Department from a Novak pesticide application, the Department cannot enforce violations of the pesticide laws against Novak is erroneous. Under N.D.C.C. § 4-35-21.1, Brodina's failure to file a verified report of loss bars him from bringing a civil action against Novak, but does not bar the

Department from bringing an enforcement action for Novak violating the pesticide laws. There is nothing in the language of N.D.C.C. § 4-35-21.1 specifically conditioning Department's enforcement action upon the filing of a report of loss of a third party claimant, and a reading of the statute forbidding the Department from bringing this enforcement action, the administrative complaint against Novak, is not only inconsistent with the wording of N.D.C.C. § 4-35-21.1, but also inconsistent with the entire scheme of regulatory enforcement contemplated by N.D.C.C. ch. 4-35 and N.D. Admin. Code art. 60-03.

3. Novak also contends that the Department must prove a knowing violation of the pesticide laws in order to impose a civil penalty. That assertion is certainly questionable, but a conclusion in regard to it need not be reached in light of the other conclusions related in this decision.

4. The Department has not met its burden of proof, by the greater weight of the evidence, in showing that by his pesticide application on June 9, as alleged in the administrative complaint, or by his pesticide application on June 8, Novak made a pesticide application inconsistent with a pesticide label provision, in violation of N.D.C.C. § 4-35-15(2).

5. The Department has not met its burden of proof, by the greater weight of the evidence, in showing that by his pesticide application on June 9, as alleged in the administrative complaint, or by his pesticide application on June 8, Novak made a pesticide application that was operation in a faulty, careless, or negligent manner, in violation of N.D.C.C. § 4-35-15(5).

6. The North Dakota Supreme Court has not imposed strict liability in any tort liability action with regard to pesticide applications or in any state enforcement actions with regard to pesticide applications. If strict liability is to be applied in such cases, it should only be

applied to aerial spraying operations. Strict liability should not be applied to impose a penalty on Novak because of his pesticide applications as evidenced in this matter.

ORDER

The greater weight of the evidence does not show that Novak violated the provisions of law as alleged in the administrative complaint. Therefore, the administrative complaint is, in all things, **dismissed**.

Dated at Bismarck, North Dakota, this 15th day of October, 2004.

State of North Dakota
Roger Johnson
Commissioner of Agriculture

By: _____
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